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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. . . . . .

KOBE, INC.,
a corporation,
and
ALTA VISTA HYDRAULIC COMPANY,
a corporation,
Petitioners,

vs.

DEMPSEY PUMP COMPANY,
a corporation,
OSCAR E. DEMPSEY,
SPECIALTY SALES SERVICE, INC.,
a corporation,
and
M. L. WALRAVEN, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 5, 1952.

OPINIONS BELOW.

The oral opinion of the District Court is unreported. It appears at pages 660 through 669 of the printed record. The opinion of the Court of Appeals (R. 1317) is reported in _____ F. 2d _____.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1952 (R. 1342). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Does the mere acquisition, by a single owner, of most of the important patents in a field of commerce, with the intent to use these patents to prevent infringement, coupled with the bringing of an infringement suit against an actual infringer of some of the patents, but without any refusal to grant licenses on reasonable terms, or other patent misuse, amount to a monopolization in violation of Section 2 of the Sherman Act?

2. When a patentee files an infringement suit against an actual infringer of his patents in the belief that he is entitled to the relief prayed for, does the fact that the court in such suit holds that he is guilty of monopolization, and that the suit is a step in effectuating the same, convert the suit *ab initio* into a wrong against the infringer, so as to render the patentee liable to the infringer, under Section 4 of the Clayton Act, for treble the damages sustained by the infringer as a result of the suit?*

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* As hereinafter shown, the adverse decision of the Court of Appeals on this question is in square conflict with a decision of the Court of Appeals of the Second Circuit.

Or, stating the question in more general form:

Does a litigant who takes a case to court with probable cause, and believing he is entitled to relief, under any circumstances become liable in damages for so doing?

STATUTES INVOLVED.

The pertinent statutory provisions are Section 2 of the Sherman Act (U. S. C. Title 15, Section 2), and Section 4 of the Clayton Act (U. S. C. Title 15, Section 15).

Section 2 of the Sherman Act provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT.

This action was filed by plaintiffs in September, 1948, in the District Court of the United States for the Northern District of Oklahoma, to obtain damages for, and injunctive relief against, alleged infringement by defendants of

five United States Letters Patent and alleged unfair competition.

Plaintiff Kobe, Inc., a California corporation engaged in the manufacture and sale of hydraulic pumps for oil wells, was the owner of four, and exclusive licensee of the fifth, of the patents sued on. Plaintiff Alta Vista Hydraulic Company, Ltd., another California corporation, was joined as a plaintiff merely because it owned legal title to the fifth patent.

Defendant Dempsey Pump Company was an Oklahoma corporation engaged in the manufacture of hydraulic pumps for oil wells. Defendant Specialty Sales & Service, Inc. was another Oklahoma corporation, which acted as sales agent for Dempsey Pump Company. The individual defendants were presidents of these two corporations.

Defendants, in their answer, denied the validity and infringement of plaintiffs' patents in suit, denied unfair competition, and contended that plaintiffs were, in any event, precluded from obtaining relief on their patents by reason of alleged violation of Sections 1 and 2 of the Sherman Act. The corporate defendants also filed a counterclaim under Section 4 of the Clayton Act, asking treble damages for the alleged antitrust violation, and an injunction to prevent enforcement of any of plaintiffs' patents against them during continuance of such alleged violation.

On trial of the case the District Court held that one patent was valid and infringed, three patents were invalid but infringed if valid, and the fifth patent was invalid and not infringed, and that defendants were not guilty of unfair competition.

On the antitrust issue, the following facts were undisputed:

Plaintiff Kobe, Inc. was organized in 1945, as a wholly-owned subsidiary of Dresser Industries, Inc., to receive

and operate a hydraulic pump business which Dresser had acquired in that year from a totally unrelated California corporation, also named Kobe, Inc., hereinafter referred to as "Old Kobe."

During the preceding 20 years Old Kobe had developed a hydraulic pump for oil wells, and had commercialized its pump to a point where its annual sales made up about 3% of the total annual sales of all types of oil well pumps, although its operations were still conducted at an over-all loss. In 1933 Old Kobe and Rodless Pump Company, a Nevada corporation which owned valuable patents but had developed no pump, had formed a patent holding company, named Roko Corporation, in which they each owned a half interest, to hold the hydraulic pump patents previously owned by Old Kobe and Rodless, and to acquire additional patents in the field, and Old Kobe had been granted what amounted to an exclusive license under the Roko patents. Between 1933 and 1940, Roko had acquired, in addition to the patents originally transferred to it by Old Kobe and Rodless, 32 patents assigned by employees of Old Kobe, and 28 patents purchased from the outside. Rights under all these patents inured to the benefit of Old Kobe under its license, although only part of them were used by Old Kobe in its commercial pumps. The most important patents owned by Roko expired prior to 1945.

As previously indicated, Dresser in 1945 acquired the assets of Old Kobe, including its interest in Roko, in exchange for Dresser stock. As part of the same transaction, it purchased, also for stock, the interest owned by Rodless Pump Company in Roko, and caused Roko to be dissolved. Dresser then organized plaintiff Kobe, Inc. as a wholly-owned subsidiary, and transferred to it the business and assets acquired from Old Kobe, and those of the Roko

patents which remained unexpired. From 1945 on, plaintiff Kobe, Inc. conducted the business with the same operating personnel, and in substantially the same manner, as Old Kobe, although plaintiff Kobe, Inc. never acquired any additional patents except from its own employees.

From 1933 to 1947 no other hydraulic pump appeared on the market to compete with the Kobe pump, and during this period no one even reached the point of asking Roko or plaintiff Kobe, Inc. for a license under their patents. In 1947 defendant Oscar E. Dempsey began manufacture of a competing pump, and retained defendant Specialty Sales & Service, Inc., a corporation owned by defendant M. L. Walraven, Jr., who was a former employee of plaintiff Kobe, Inc., to sell it. In 1948 Dempsey incorporated his pump business and the manufacture of the Dempsey pump was thereafter carried on by defendant Dempsey Pump Company.

None of the defendants asked plaintiff Kobe, Inc. for a license under its patents, although the Dempsey pump was a clear infringement of certain of the Kobe patents. After having inspected Dempsey pumps, and examined diagrammatic drawings which showed the infringement,* Plaintiff Kobe, Inc. notified defendants of the infringement at the Tulsa Oil Show in May, 1948, but defendants maintained that their pump did not infringe. Thereafter, plaintiff Kobe, Inc. instructed its salesmen, when asked by customers what Kobe, Inc. intended to do about the Dempsey infringement, to reply that it would probably bring an infringement suit against Dempsey (R. 1210). On September 14, 1948, the present suit was actually filed. On September 27, 1948, after receiving many inquiries from

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* The intimation by the Court of Appeals that plaintiffs filed suit without adequate prior evidence of infringement has no support either in the Findings of the District Court or in the record.

customers about the suit, plaintiff, Kobe, Inc. sent out a letter advising them of its filing and pendency (P. Ex. 20, R. 980). Thereafter, some of Dempsey's prospective customers asked Dempsey to indemnify them against liability for patent infringement, and sales of the infringing pump fell off.

Apart from the above basic facts, a great deal of evidence was introduced bearing on intent and motive. Over the strenuous protest of plaintiffs, the District Court in its Finding of Facts (R. 133 to 158) found that the circumstances under which Old Kobe and Roko had acquired their patents, and the agreements which they made relative thereto, evinced an intent on the part of Old Kobe to use these patents to exclude all competitors from the field of hydraulic pumps; that Dresser and plaintiff Kobe, Inc., when they acquired the Old Kobe assets, had intended to continue Old Kobe's monopoly in the field; that the filing by plaintiff Kobe, Inc. of the instant infringement suit, and the notification of the trade thereof, were steps in effectuating the monopoly; and that, as the result of the suit and notification, Dempsey Pump Company had sustained damage in the amount of $143,364.00 and defendant Specialty Sales & Service, Inc. had sustained damages in the amount of $23,481.00.

On the basis of these findings, the District Court held in its Conclusions of Law (R. 161 to 163) that plaintiffs were guilty of monopolization, that they were therefore precluded from obtaining relief for infringement by defendants of the patent held valid and infringed, and that, in addition, they were liable to defendants on their counterclaims for treble the damages sustained, plus attorneys' fees, or a total of $527,537.00 and should be enjoined as defendants had prayed.

The District Court reached these conclusions even though it found as a fact (Finding 43, R. 146) that:

> "So far as the record in this case shows, during the period of time that plaintiff Kobe, Inc. has owned the rights under such patent, and prior thereto during the period that Roko owned the same, no one asked either such Plaintiff or Roko for a license under any of such patents and neither plaintiff nor Roko has ever refused to grant such a license";

and that, while plaintiff Kobe, Inc. had hoped by the infringement suit to eliminate defendants as competitors, nevertheless (Finding 55, R. 151):

> "Plaintiff Kobe, Inc. did not prosecute its infringement action in bad faith, but pressed the same believing that it would recover the judgments prayed for therein, and believing that it was legally entitled to the relief prayed for. It also believed it had a legal right to circularize its letter of September 27, 1948 as an accompaniment of its infringement action."

On April 13, 1951 plaintiffs filed their notice of appeal (R. 163), appealing from so much of the judgment as denied relief to plaintiffs and granted relief to defendants on account of plaintiffs' alleged antitrust violation, and as held invalid two of the patents on which plaintiffs had sued. The appeal as to one of the patents held invalid was later dismissed by plaintiffs.

Before the Court of Appeals, plaintiffs contended that the judgment of the District Court on the antitrust issues was erroneous for the following reasons:

> 1. Because not even Old Kobe had the power or purpose to exclude competitors;
>
> 2. Because, in any event, plaintiff Kobe, Inc. was not responsible for the acts of Old Kobe, was not shown itself to have had a purpose to exclude competitors, and, in view of the fact that the most important patents had expired before the Dresser acquisition, certainly never had the power to exclude them;

3. Because the mere acquisition by a single patent owner of most of the important patents in a field with the intent to use them to prevent infringement, and the filing by such owner of an infringement suit against an actual infringer of his patents, did not amount to monopolization in absence of a showing that the patent owner had either refused to grant licenses under his patents or misused his patents in some other way; and,

4. Because, even if plaintiff was guilty of monopolization and was therefore precluded from obtaining affirmative relief on its patents, nevertheless, in view of the fact that all it had done was to file an infringement suit against an actual infringer of its patents, in the belief that it was legally entitled to the relief prayed for, it had not committed an "injury" to the infringer so as to become liable for "damages" under the provisions of Section 4 of the Clayton Act.

The Court of Appeals, after hearing, affirmed the judgment of the District Court in all respects (See opinion of Court of Appeals, R. 1317 to 1342).

In filing the present petition we are not asking this Court to review the rejection by the Court of Appeals of all the above contentions. While we believe that the Court of Appeals was wrong in holding that Old Kobe had the power and the purpose to exclude competitors and that plaintiff Kobe, Inc. had a similar power and purpose, we recognize that these are in part factual decisions which this Court will not review. The issues on the basis of which we are asking this Court to grant certiorari in the instant case are, as indicated in our statement of questions presented, the legal issues raised in contentions 3 and 4 above.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that plaintiffs, or either of them, were guilty of any violation of the antitrust laws.

2. In holding that plaintiffs were precluded from obtaining affirmative relief on the patent held to be valid and infringed.

3. In enjoining them from enforcing or asserting any of their patents against defendants.

4. In holding that plaintiff Kobe, Inc., even if guilty of monopolization, was liable to pay damages to defendants, or either of them, in any amount.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

A. The Issue of Monopolization.

1. The question whether the mere acquisition by a single owner of most of the important patents in a field of commerce, with the intent to use them to prevent infringement, coupled with the bringing of an infringement suit against the actual infringer of some of the patents, but without any refusal to grant licenses on reasonable terms, or other patent misuse, amounts to a monopolization of the field in violation of Section 2 of the Sherman Act, is a question of manifest importance to the interpretation of the antitrust laws and the patent laws in the field of their joint application. This Court has never passed on this question; nor has it held in any case that a single owner violates the Sherman Act when he merely acquires patents and exercises the rights they purport to give.

2. The importance of the question is more fully shown, and the probable error of the decision of the Court of Appeals is indicated, by the following:

(a) This Court has made it clear that in non-patent cases, the possession of monopoly power, coupled with the intent of exercising it, amounts to illegal monopolization. *Schine Theaters v. United States*, 334 U. S. 110, 130 (1948); *American Tobacco Co. v. United States*, 328 U. S. 781 (1946).

However, patents give to a patentee, within the field of the patents, a legal right to exercise monopoly power, and to do so purposely. It follows that illegal monopoly is not established in a patent case, unless, in addition to possessing the monopoly power conferred by its patents, and having the intent to exercise such power, the patentee has used his patents in such a manner as to exceed the rightful limits of the patent grant. The distinction in this regard between patent and non-patent cases was stated by the District Court for the Southern District of New York in *United States v. General Electric Co.*, 80 F. Supp. 989, 1015 (1948), as follows:

> "Decision must turn on whether or not the patent privilege has been misused. Although in a non-patent case exclusion, unlawful achievement, and abuse of monopoly power may not need to be proved, elements of such conduct are necessary in a patent case before Section 2 may be invoked."

(b) The mere acquisition by one owner of most of the important patents in a commercial field, is not of itself a misuse of patents. In *Transparent Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637 (1947), this Court pointed out that the right to acquire patents by assignment was specifically conferred by the patent laws. More re-

cently, in *Automatic Radio Co. v. Hazeltine*, 339 U. S. 827 (1950), in which the plaintiff owned 570 patents and 200 applications, this Court stated, at page 834:

> "The mere accumulation of patents, no matter how many, is not in and of itself illegal."

(c) If the acquisition of most of the important patents in a commercial field is not illegal, neither the intention of using these patents to exclude infringers, nor the filing of an infringement suit against an actual infringer, can be illegal. As often stated by this Court, a patent "consists altogether in the right to exclude everyone from making, using, or vending the thing patented, without the permission of the patentee." *Bloomer v. McQuewan*, 14 How. 539, 549 (1852); *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 425 (1908). The intentional using, or the actual use, of patent rights in the only manner in which they can be used, is a legal use, and not a misuse, of the patent rights.

(d) Nor was the intention of using the patents to prevent infringement, or the filing of suit against an actual infringer, converted into a misuse because one or more of the patents sued on were patents which plaintiff did not use in its own commercial pump. As held by this Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co., ante*, the filing of a suit for infringement of a patent which patentee does not himself use is not a misuse of the patent. If the rule were otherwise, the logical result would be that the filing of any suit for infringement of a basic patent which the patentee did not use would be a violation of the antitrust law.

(e) It is possible that if the patents acquired by a single patent owner covered all possible competitive devices in a commercial field, some of which patents the

patent owner did not use, it would be a misuse for him to refuse to grant licenses to competitors on reasonable terms. See *Stewart-Warner Corp. v. Staley*, 42 F. Supp. 140 (D. C. W. D. Pa., 1941).

In the instant case, there is no finding that plaintiff's patents covered all possible competitive devices in the field, and there could be no such finding because the record shows that the most important patents, disclosing complete hydraulic pumps, expired prior to the Dresser acquisition and the formation of plaintiff Kobe, Inc.,* and that there were hundreds of hydraulic pump patents which neither plaintiff Kobe, Inc. nor Roko ever acquired (R. 1095-1098, 634).

But even in a case in which the patent owner had acquired patents covering all competitive devices, and made no use of these patents, we submit that the possible misuse would consist, not in the acquisition of the patents nor in the non-use of some of them, but in a refusal to grant licenses to competitors on reasonable terms. This is indicated by the fact that, even in cases such as *Hartford-Empire v. United States*, 323 U. S. 386 (1945) in which a group of competitors was held to have monopolized a field of commerce by combining their patents which collectively dominated the field, and then parceling out exclusive rights in various parts of the field, the relief granted to the United States by this Court did not go beyond a requirement that the offending patentees offered licenses under their patent rights for a reasonable royalty to all who desired such licenses. If competitors who have thus misused dominant patent rights have no obligation beyond offering to grant

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* Humphreys Patent No. 1,577,971, Crum Patent No. 1,562,-688, and Suter Patent No. 1,557,116, which were the only patents shown by the record to be at all basic (R. 175, 190, 237) had all expired by 1943 (R. 916, 929, 1090).

licenses at reasonable royalties, certainly a single patent owner who has himself acquire dominant patent rights but has not misused them, wou have no greater obligation.

(f) Defendants sought in he Court of Appeals to avoid the force of the above arg ment by contending that the burden was not on them to sh w that plaintiffs refused to grant licenses on reasonable terms, but on plaintiffs to show that such licenses would have been granted if requested. However, as we have shown above, patent misuse is an essential element of the ffense of monopolization in a patent case, and we submit th it the burden was on defendant, in order to sustain th r antitrust contentions, to prove that plaintiff Kobe, Inc. misused its patents, either by refusal to license on reasonab terms or in some other manner.

On the basis of the above, we submit that the Court of Appeals not only decided a quest on of vital importance to the proper interpretation of the tent and antitrust laws, but decided it erroneously, when it held that a single patent owner was guilty of monopolization in violation of Section 2 of the Sherman Act, wh n all it did was to acquire important patents in a field of commerce, with the intent of preventing infringement, and t file an infringement suit against an actual infringer.

B. The Issue of Liability for Damages.

1. Even if our above contention be unsound, and plaintiff Kobe, Inc. be guilty of monopolization, the only acts done by it which are indicated by the record to have adversely affected defendants in any way are the following:

(a) On September 14, 1948 plaintiff Kobe, Inc. filed the present suit.

(b) On various occasions prior to filing suit, when customers asked salesmen of Kobe, Inc. whether it intended to sue Dempsey for infringement, the salesmen replied that plaintiff Kobe, Inc. believed that the Dempsey pump might infringe its patents, and that, as soon as it learned definitely that a sale had been made, it would probably test the question of infringement in court (D. Ex. 26, R. 1210).

(c) After filing the suit, and after receiving many inquiries about the suit from customers, plaintiff Kobe, Inc., on September 27, 1948, sent out to purchasing agents or other executives of certain of ~~the~~ customers a letter advising them that suit had been filed (P. Ex. 20, R. 980).

The present suit was clearly filed with probable cause, as defendants were held to have infringed four of the patents sued on, and one of the infringed patents was held to be valid. The answers given by salesmen to customers' questions, referred to in (b) above, were merely truthful, restrained and proper answers to the questions asked. The notification referred to in (c) above was likewise a factual and restrained notification. Similar notifications have universally been held to be legitimate incidents of the filing of a patent infringement suit. See *Alliance Securities Co. v. De Vilbiss Mfg. Co.*, 41 F. 2d 668 (C. C. A. 6, 1930); *Oil Conservation Engineering Co. v. Brooks Engineering Co.*, 52 F. 2d 783 (C. C. A. 6, 1931); *United States Galvanizing & Plating Equipment Corp. v. Hanson-Van Winkle-Munning Co.*, 104 F. 2d 856, 861 (C. C. A. 5, 1939).

The District Court, while it held that the suit was filed and the notice was given in furtherance of the alleged

purpose of plaintiff to exclude competitors, specifically found in Finding 55 (R. 151):

> "Plaintiff Kobe, Inc. did not prosecute its infringement in bad faith, but pressed the same believing that it would recover the judgments prayed for therein, and believing that it was legally entitled to the relief prayed for. It also believed it had a legal right to circularize its letter of September 27, 1948 as an accompaniment of the infringement action."

Accordingly, this case presents squarely the legal question whether a patent owner, who files an infringement suit, with probable cause, against an actual infringer of his patents, and who is denied relief on the ground that the suit was brought with an intent to monopolize, is in addition liable, under Section 4 of the Clayton Act, for treble the damages the infringer has sustained as a result of the suit, even though the only acts of the patent owner affecting the infringement are the filing of the suit and acts legitimately incident thereto, and even though it is specifically found that the patent owner brought the suit believing that he was legally entitled to the relief prayed for.

2. There is nothing in any decision of this Court to sustain the adverse decision of the Court of Appeals on the above question.

This Court has held in numerous cases that a patentee who has used his patents in violation of the antitrust laws should be denied affirmative relief against infringement of his patents until he has purged himself of the antitrust violation. See *Morton Salt Co. v. Suppiger,* 314 U. S. 488 (1942), *Mercoid v. Mid-Continent,* 320 U. S. 661 (1944) and similar cases.

But this Court has never indicated that when a patentee brings an infringement suit against an actual infringer of his patents, in the belief that he is entitled to

the relief prayed for, the fact that the court in such suit holds that he is guilty of monopolization, and that the suit is a step in effectuating the same, converts the suit *ab initio* into a wrong against the infringer, so as to render the patentee liable to the infringer, under Section 4 of the Clayton Act, for treble the damage sustained by the infringer as a result of the suit. As a matter of fact, there is no such indication in any decision of any court prior to the decisions of the court below in this case.

3. The decision of the District Court and the Court of Appeals on this point is in direct conflict with the decision of the Court of Appeals of the Second Circuit in *Straus v. Victor Talking Machine Company*, 297 Fed. 791 (1924).

In that case Victor had brought a patent infringement suit to restrain Macy's Store (owned by Straus) from infringing Victor's patents on records and sound reproducing machines. Macy's defended on the ground that Victor had violated the Sherman and Clayton Acts by refusing to supply Macy's with Victor patented goods, except under an illegal contract which Macy's had declined to sign. This defense was sustained by the court, and Macy's then brought against Victor a treble damage suit under the antitrust laws. In this action, Macy's first contention was that the infringement suit had been a step in pursuance of an illegal combination, and that it was, therefore, within the meaning of the antitrust laws, an "injury" for which Macy's was entitled to recover three-fold its "damages"—these damages being, according to the contention of Macy's, its attorneys' fees in the patent infringement suit.

Macy's second contention was that Victor had incurred liability for treble damages under the antitrust laws by refusing to furnish its patented goods to Macy's for resale, except under an illegal contract.

While the Circuit Court of Appeals sustained an award of damages to Macy's on the second ground above stated, it reversed the award made on the first ground. On this point the court stated, at page 797:

> "What the court held, and what plaintiffs now contend, is, when simply stated, that resort to the courts, if unsuccessful, may be a step in violation of the statutes here concerned, and that a jury may so find, and award as part of the damage the fees of the attorneys of the successful party. If Victor Company had been successful, plaintiffs would not be here; for, in that event, the license agreements would have been held lawful. We think this mere statement displays the error in this regard.
>
> "The sections of the statutes (noted in the margin) speak of the 'damages by him sustained.' 'Damages' must be construed as that term was known to the law when these acts were passed. Kepner v. United States, 195 U. S. 100, 124, 24 Sup. Ct. 797, 49 L. Ed. 114, Ann. Cas. 655. As said by the Supreme Court in Pennsylvania Railroad Company v. International Coal Company, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, when construing section 8 of the Interstate Commerce Act (Comp. St. Sec. 8572):
>
> " 'The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained.' "

The court then went on to say that the case before it was not one in which a suit had been brought without "probable cause," and that therefore, it was not required to decide whether the filing of suit without probable cause would give rise to an action for damages. Rather, the court continued, the original patent suit had been one in which

all issues before the court, including the antitrust issues, had been debatable, and, in view of this, to hold Victor liable in damages for filing the suit would be to repudiate the doctrine of free access to the courts and to "announce that he who seeks the judgment of the courts does so at his peril." Accordingly, the court held that the filing of the suit, even if a step in the antitrust violation did not render Victor liable for damages under Section 4 of the Clayton Act.

The conflict between the decision in the instant case and the decision of the Second Circuit Court of Appeals in the *Straus* case was expressly recognized both by the District Court in its supplemental oral opinion (R. 881, 882) and by the Court of Appeals in its written opinion (R. 1332), in the instant case.

Thus, while the District Court refused to follow the decision in the *Straus* case, it expressly stated (R. 881):

> "Actually the case of Straus against Victor Talking Machine Company, I think is the only case that is strongly in point.
>
> "Defendants sought to distinguish that case from our situation here but do not think that it can successfully be done. *I think we have the identical question before the court in the Straus case that we have here* and the majority view expressed in that case was that no recovery could be had for the damages resulting from the situation of a patent infringement suit because of the so-called free access doctrine." *

In affirming the District Court decision on this point, the Court of Appeals similarly stated (R. 1332):

> "We are unable to agree with statements to the contrary in the Straus case."

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* Emphasis is ours throughout this petition.

While the rule of the *Straus* case was rejected by the District Court and the Court of Appeals in the instant case, the continued vitality of the rule is shown by its reiteration by the Second Circuit Court of Appeals in the case of *Kellogg Co. v. National Biscuit Co.*, 71 F. 2d 662 (1934). In that case Judge Augustus Hand stated at page 666:

> "While it doubtless would not be within the Anti-Trust Acts to bring a suit to assert a patent or trade-mark right whatever the motive, if the claim was valid, an attempt to assert an invalid claim would be a different matter."

4. We believe that the decision of the lower courts in this case on the liability for damages is erroneous, and that the conflicting decision of the Court of Appeals for the Second Circuit in the *Straus* case is correct.

We do not believe that a patentee, even if he has used his patents to monopolize, does an "injury" to an infringer, or becomes liable in "damages" to him, under Section 4 of the Clayton Act, merely by suing him for infringement, at least where the patents are actually infringed and the patentee believes that he is entitled to relief prayed for. A contrary holding would be particularly unjust in cases like the *Straus* case or the instant case, in which the fact of monopolization is highly debatable, and the adjudication of guilt is made for the first time in the patent suit in which the counter-claim for treble damages is filed. Our case on this point was well put by the Second Circuit Court in *Straus v. Victor* when it stated at page 77:

> "Never was it more necessary than now to preserve unimpaired this right so vital to the public welfare and so thoroughly a part of our theory of government. New economic problems increasingly arising in a constantly developing nation require solution, and hence lead to legislation. The statutes thus en-

acted to meet these problems can rarely, if ever, be so certain and detailed in expression that their meaning or extent can be ascertained without judicial determination. The difficulty which attends their construction is best shown by the wide variance in the opinions of the courts and the constant resort to the Supreme Court for authoritative decision. It is thus not strange that lawyers and laymen may differ as to the meaning of such statutes, and *it would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage.*"

We accordingly submit that even if the issue of liability for damages were the only one in the case, this Court should nevertheless take jurisdiction. By so doing, this Court will not only resolve a square conflict of decisions between the Courts of Appeals for the Second and Tenth Circuits. It will also settle an important point in the construction of Section 4 of the Clayton Act, which is likely to recur in many patent infringement cases.

In addition, it will settle the question, vital under our system of law, of whether a litigant who takes a case to court with probable cause, and believing he is entitled to relief, can under any circumstances become liable in damages for so doing.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 270

In the Supreme Court of the United States

October Term, 1952.

Kobe, Inc., a corporation, and Alta Vista Hydraulic Company, Ltd., a corporation, *Petitioners,*

vs.

Dempsey Pump Company, a corporation, Oscar E. Dempsey, Specialty Sales and Service, Inc., a corporation, and M. L. Walraven, Jr., *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

In opposition to the petition respondents respectfully pray that review be denied to petitioners. Their brief in opposition follows.

Opinions Below.

The District Court filed no written opinion. Its findings are reported at 97 F. Supp. 342, and are found at pages 133 through 158 of the printed record. Oral comments of the trial court respecting its judgment are found at pages 660 through 669, and at pages 880 through 892 of the record.

The opinion of the Court of Appeals (R. 1317-1342) is reported at .... F. (2d) ...., and is published at 94 U. S. Patent Quarterly 43, Advance Sheet of July 19, 1952.

Jurisdiction.

Judgment of the Court of Appeals affirming the District Court was entered on July 5, 1952 (R. 1342), and petition for certiorari was filed on August 12, 1952. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1) relating to review by the writ of certiorari.

Questions Urged by Petitioners.

Respondents respectfully object that the questions urged by petitioners for review do not arise upon the facts found and affirmed below. As is disclosed by the opinion of the Court of Appeals (R. 1317-1342), and by the findings entered by the trial court (R. 133-158), the judgment affirmed below rests upon facts which are vastly more provocative than is disclosed in petitioners' "questions" or in their statement of the case.

With respect to question numbered 1, we urge that neither of the lower courts placed its judgment of guilt against petitioners upon "mere acquisition" of patents coupled with an infringement action without patent misuse. The question posed ignores the issues tendered for decision, the findings thereon, and the stated premise of the affirming opinion of the Court of Appeals.

Neither does the judgment for damages rest upon a simple claim for injuries caused solely by the good faith prosecution of an infringement action, as is presupposed by petitioners' question numbered 2. Indeed, the Court of Appeals answered petitioners' second question as petitioners desire (R. 1331, 1332), but pointed out that the issues were framed upon a broader picture in which the legal action was but a significant part of a planned intentional wrong compensable under the Clayton Act.

As the questions posed do not fairly arise upon the issues joined and the judgments entered below, and as the statement of the case contained in the petition is incomplete in respects found by the lower courts to be significant and even controlling, we have no alternative but to restate the case as it was presented below.

Following our restatement, we shall attempt to restate the "questions presented" in the terms in which they actually arose, and in the terms in which they will be presented here if the case be accepted for review.

Statutes Involved.

The statutes involved are Sections 1 and 2 of the Sherman Act (Title 15, U. S. C., Sections 1 and 2), and Section 4 of the Clayton Act (Title 15, U. S. C., Section 15.)

Section 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade marks, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the Commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competi

tion under Section 45 of this title: *Provided, Further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The petition suggests that only Section 2 of the Sherman Act is involved in the case. Presumably this view is taken because both lower courts found that petitioners had achieved an actual and total monopoly of commerce and were guilty of "monopolizing" in violation of the section. But the pleadings, the evidence, and the findings all reflect a series of violations of Section 1, consisting of contracts, combinations, conspiracies and the like intended and designed to establish, maintain or continue the illegal monopoly which was successfully accomplished through their agency.

The violations of Section 1 are sufficient in themselves to sustain the injunctive relief awarded against enforcement of petitioners' patents, and very probably would sustain the award of damages, in which event the questions posed by the petition would become academic.

Statement of the Case.

The subject of controversy is hydraulic pumping equipment for lifting oil from deep wells. Commerce in such equipment is as widespread as the oil industry. Petitioner Kobe, Inc., (and its predecessor of the same name) has enjoyed a total monopoly of this commerce since 1933. Patents were involved in the case, but the principal issues turned upon petitioners' illegal engrossment of commerce, and the means by which it was accomplished. Both lower courts found the monopoly to have been intentially achieved, pursuant to deliberate plan, and to violate the Sherman Act. Both lower courts found respondents to have been injured in their business and property by acts of petitioners calculated to exclude them from competition in furtherance of the monopoly, and damages therefor were adjudged and affirmed under the Clayton Act.

Throughout the litigation petitioners have attempted to justify their admitted engrossment of the subject commerce as the fair and legal emolument of their ownership of a formidable array of patents; urging, as they do here, that the product of multiplied individual patent privilege is legal immunity from the penalties of the antitrust laws.

The case is not as simple as is indicated in the petition; for petitioners' patents were accumulated in a restricted pool, originally formed between competitors but quickly closed even to participants other than the emerging monopolist, into which were swept by contract and purchase all actually competing and potentially competitive product designs, together with many which never reached even experimental stage but which attracted the watchful eye of counsel commissioned to monitor new patent grants in the field.

The purpose of the original patent pool was frankly declared to be to build up, extend and protect a presumed "patent monopoly" in hydraulic pumps. All of the usual accompaniments of illegal monopolies are found in the record. The original agreement contained a price fixing covenant between the owners of the pool who should have been competitors. Royalties exacted by the pool burdened a commerce which far transcended the patent grants involved; the pool's principal early competitor was absorbed by purchase and a contract which effectually removed its product from the market in consideration of payments taxed against commerce in unpatended goods; and covenants were exacted of potential inventors or competitors which required them to remain out of competition and to surrender relevant future inventions and patents to the pool. Patents defining many designs of pumps were ac-

quired, but only one design was offered to the market. The remainder were held out of production and used only to "fence" the commercial product of Kobe, Inc., and latterly, to aid the attempt to drive respondents from the competitive field. By 1948, just prior to the commencement of this action, the patent fence had been fortified to an extent that the chief officer of Kobe prefaced his demand that respondents cease competition with the boast that no one could make a satisfactory hydraulic pump without infringing one or another of petitioners' patents. That this observation stated the belief of petitioners is without doubt, and that it paraphrased the intended end and purpose of the patent pool has been both found and affirmed below. Other and immediately damaging acts were focused against respondents to drive them from the competitive field, which very nearly succeeded, and resulted in the serious losses which were compensated by the judgment for damages assessed and affirmed below.

In view of the abbreviated statement of the case contained in the petition, the foregoing statements require annotation to the record. Perhaps the shortest guarantee of their integrity is found in the opinion of the Court of Appeals (R. 1317-1342) where the issues which were actually decided below are fairly stated. Nothing less than the statement contained in this opinion should be accepted as the case submitted for judgment. As the opinion is necessarily less than explicit in its reference to the record, we presume to document it with further reference to the circumstances in the proof which induced the original findings.

It should not be thought that hydraulic pumps for oil wells are new to the industry, or that they are recent in conception. The first patent for such a device was granted

in 1878,[1] and hundreds of similar patents have been granted since.[2] Presumably the first patent could legally have granted a brief monopoly upon all pumps of the type, but the basic principle and practice have long been in the public domain. Current patents are necessarily limited to narrow improvements, or to complicated combinations thought to have virtue in limited application. The art is old, and is crowded, but by the acquisition or control of more than ninety patents, granted to many inventors, petitioners attempted and intended to capture an industry,[3] and except for the judgment in this case would have succeeded.

It likewise should be understood that the commerce captured and controlled by exclusive possession of the bottom hole pumping unit itself was far greater than the mere sale of the pumping device. It is clear that sales of hydraulic pumps are almost invariably accompanied by sales of auxiliary equipment, necessary to their operation, which greatly exceed the price of the pump itself.[4] This equipment consists of the tubing, filters, surface tanks, surface compressors, and power units necessary to effect an hydraulic pumping installation.[5] During the monopoly, the experience of the petitioner Kobe, Inc., was that dollar sales of unpatented auxiliary equipment exceeded pump sales in dollars in a ratio of more than four to one.[6] It was shown that the dealer who could offer the bottom hole pumping unit was enabled to sell the much larger value of unpatented aux-

1. Faucett Patent No. 204015 was Defendants' Exhibit 7A, which is not included in the printed record, but its admission is noted at R. 604 and its date, May 21, 1878, is reflected at R. 210.
2. R. 1095, through 1098.
3. Finding 38, R. 145.
4. Findings 36, R. 144, and 60, R. 152.
5. R. 559, 560.
6. R. 897.

iliary equipment, and that one who was without the necessary bottom hole unit was effectually excluded from this commerce. The commerce at stake was substantial, amounting in the year 1948 to more than $4,000,000.00.[6]

It is true that the hydraulic or "rodless" pump was not produced commercially until about twenty years ago, when the early introductory enterprises of Scott-Ross and Company, Rodless Pump Company, Alta Vista Hydraulic Co., Ltd., Arthur G. Gage, and Kobe, Inc., were finally consolidated in the corporate predecessor of the petitioner, Kobe, Inc. But its emergence as an important article of commerce was foreseen about 1926, as the depth of oil wells increased and rotary drilling methods confronted the producer with well bores which deviated greatly from vertical.[7] Elimination of metal rods for power transmission then became of prime concern, and the hydraulic installation became both comparatively economical and in many instances virtually a necessity.[8] Manufacture and marketing of hydraulic pumps and related equipment quickly became an important corollary enterprise to the oil industry, but for more than fifteen years was the exclusive domain of petitioner Kobe, Inc., and its predecessor of the same name.[9] This was no accident, but was the result of shrewd planning to an illegal end, as the two lower courts have found,[10] and we now shall show.

The central figure in petitioners' activities was C. J. Coberly, who was president of Kobe, Inc., and of its predecessor corporation of the same name, and was the directing head of its enterprises at all relevant times. He was

7. R. 174.

8. Note Findings 31 and 32, R. 143.

9. Findings 35 and 36, R. 144.

10. Findings 38 through 55, R. 145-151.

an engineer, an inventor, and an industrialist of prominence. He saw the need of the oil industry for a "rodless" pump in 1925, and developed a design for such a pump. He secured several patents on his design.

But others than Coberly had seen the need and the potential market awaiting hydraulic pumping equipment, and were already moving to supply it. Ira B. Humphreys, of Denver, Colo., had devised an hydraulic pump which he had built and operated.[11] Humphreys had been granted two patents which Coberly regarded as of fundamental importance. Coberly tried to acquire the Humphreys patents, but was refused.[11] Roland R. Crum had designed and built a pump and had been granted a patent which he assigned to L. & B. Producing and Drilling Company.[12] Arthur G. Gage, of Los Angeles, was actively engaged in devising and producing an hydraulic pump which was the first to reach the commercial market, and which was successfully employed in the wells of major operators.[13] An engineer named Scott had designed a pump and organized a corporation to produce it, which was Scott-Ross & Company of San Francisco.[14] Each of these enterprises held patents respecting its intended product, and each was moving independently toward realization of the commercial market therefor in the years between 1926 and 1933. In this period a typical competitive development of several independent hydraulic pump designs was in prospect. But competition in the industry was not to be realized, and it died at the hand of Kobe.

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11. R. 176, 190, 211.
12. R. 210, 929, 1002.
13. R. 190, 212, 1071, 1078.
14. R. 1000, 1002.

Rodless Pump Company.

Scott-Ross and Company secured an exclusive license under the Crum patent which it added to the patents of its own engineers, Scott and Yungling. It then succeeded where Coberly had failed, and added exclusive rights under the Humphreys patents,[15] to move into a position of early dominance of the scene. By a corporate split the Scott-Ross hydraulic pump enterprise became Rodless Pump Company,[16] which is a principal figure in the events which followed. It secured additional capital, established an assembly shop, caused parts to be produced commercially for its account, and prosecuted experimental installations of its product.[16] It was experiencing financial as well as engineering difficulties when it was approached by Coberly in his first move toward consolidation of the new industry.

First Rodless-Kobe Agreement.

By the end of 1932, Coberly had progressed with his own experiments to a point where he was ready to produce a pump of his own design as a product of Kobe, Inc., which was already well established as a manufacturer of oil industry specialties. He expressed concern that his pump transgressed the claims of the Humphreys and Crum patents, and stated that he approached Rodless Pump Company to discuss claims of apparent patent conflict. The discussion resulted in a written contract between Rodless and Kobe by which the cornerstone of the Kobe monopoly was laid. The full text of the agreement is found at pages 901 through 915 of the printed record.

In capsule, the contract provided for establishment of

15. R. 915, *et seq.*

16. R. 1023-1026.

a pool of hydraulic pump patents in a new corporation which was named Roko Corporation. Rodless and Kobe were required to transfer all their pump patents to Roko, and covenanted to surrender to the pool any new relevant inventions or patents acquired in the future. Roko was directed by a board named equally by the contracting parties, and its stock was held in equal shares. Roko was committed to the immediate grant of full license under all the pooled patents to Kobe, Inc. But Rodless was to receive a similar license only if it elected to claim the same within three years.[17] It was provided that Roko might not grant any other license except by unanimous vote of directors controlled by the contracting parties.[18] Roko was authorized and required to establish a "schedule of prices and terms of payment" to govern commerce of its licensees in products covered by the license.[19] Of most revealing significance is a paragraph entitled "Plan of the Company"[20] wherein Roko is frankly dedicated to continued acquisition of patents having to do with hydraulic pumps, and is committed to "build up and maintain its patent monopoly." Such was its declared purpose, and such was its career in actual event.

Attached to the Rodless-Kobe agreement, and incorporated therein, is the form of license agreement which issued (only to Kobe) and which again is revealing of the motives of the transaction.[21] The licensee subscribed to price fixing by Roko,[22] and agreed to surrender to or procure for Roko any future relevant patent rights coming to its

17. R. 911, par. XII.
18. R. 911, par. XIV.
19. R. 912, par. XV.
20. R. 911, par. XI.
21. R. 932-943.
22. R. 939, 940, par. XII.

attention.[23] In a paragraph captioned "Further Assistance" the licensee agreed to aid Roko "in building up, extending, and protecting the established patent monopoly of licensor in and to 'Rodless Pumps'."[24]

The royalty provision of the license agreement[25] are particularly revealing. Kobe (or Rodless if it had been licensed) was required to pay into Roko 70% of its net profits arising from dealings in "rodless pumps" and auxiliary equipment as well. Thus the power of the patent pool was exerted to exact an exorbitant toll upon the much richer commerce in unpatented auxiliary equipment, which the parties then recognized to be captive to the seller who likewise could provide the pump. There is no mere license to practice the narrow inventions of an art which was approaching exhaustion. Here are several limited sanctions of many narrow patents were cumulatively employed to regiment and pre-empt a commerce which far transcended the subject matter of any patent grant.

At the signing of this agreement, both Rodless and Kobe were committed to the program of engrossment which followed. Rodless still held an option to enter competition with Kobe if it reached such a decision within three years, but this option was speedily dealt with by Kobe in a second agreement which followed in less than two years. Patents of great importance had been consolidated in the pool, and a method had been provided for its expansion to include others as they might appear. Armur G. Gage and Alta Vista Hydraulic Co., Ltd., remained outside the pool, and were in actual production of a competitive product which did not

23. R. 941, par. XIV.
24. R. 941, par. XV.
25. R. 933, par. IV.

transgress the pooled patents. Indeed, Gage and Alta Vista had their pump on the market and in the wells of important major producers. But Gage and Alta Vista were not to remain in competition with Kobe as will now appear.

Envelopment of Gage and Alta Vista.

The Gage enterprise had been developing its pump at Los Angeles since about 1924.[26] Gage had been granted a number of patents, seven of which he held individually, and three of which were assigned to Alta Vista Hydraulic Co., Ltd., a corporation owned by the Gage family. By 1933, the Gage interests had produced two pump models which had survived initial tests, and its product had entered the commercial market—doubtless the first to do so. Successful sales had been made to major producers on the Pacific Coast,[27] and the pump had been offered to producers in the mid-continent area through a licensee who had sold other installations. When it was approached for integration into the Roko pool, the Gage enterprise was still small, and was suffering financial stringencies typical of the depression period, but had already achieved the impetus which follows successful utilization of a new product by important users such as Gulf Oil Corporation and Plymouth Oil Company. It should be remembered that the Gage pump was wholly different in design from the Kobe pump, and there was no claim that its structure infringed the Roko patents.

Coberly, or Kobe, suggested to Roko the desirability of adding the Gage and Alta Vista patents to the pool.[28] This result was accomplished by two contracts executed in

26. R. 1045.
27. R. 1079.
28. R. 217.

April of 1934. By the first,[29] Roko purchased the seven patents held by Gage for a cash consideration. But this contract plainly bore the earmark of monopolistic intent, for it required Gage to covenant against engaging in any business or accepting any employment "in any way detrimental" to the business of Roko or its licensee for a period of five years.[30] Gage further was required to surrender any future inventions and patents which he might make or secure relating to rodless pumps for about ten years following the contract date.[31] Another significant provision of this contract was a covenant that neither Roko nor its licensee should be obliged to produce or market any of the devices covered by the patents assigned.[31] As the product already was on the market, the provision evinced an intention to remove it, and this is what occurred. Coberly admitted that the Gage patents were acquired without intention to produce the Gage pump,[32] and no commercial use was ever made of the patents, though a substantial sum had been paid for them.

The contract with Alta Vista[33] took the form of an exclusive license under five patents which it held. Alta Vista covenanted to grant no other license so long as the Roko license was in force, and later agreed that it would not itself engage in production under the patents.[34] The now familiar covenant to grant similar exclusive rights under future patent acquisition was included. Royalties were exacted by Alta Vista upon gross sales by Roko licensees of any and all hydraulic pumps of any design, and upon sales

29. R. 968, *et seq.*
30. R. 970.
31. R. 971.
32. R. 213.
33. R. 963-968.
34. R. 974.

of unpatented auxiliary equipment (except tubing) as well.[35] Again patents were used to exact a toll upon commerce in goods beyond the patent grant, and again an intention to abandon or eliminate the Gage product is evident. No pumps were produced under the Alta Vista license, and the only use made of the patents was in this action, wherein respondents were charged to have infringed their claims. The infringement claims were first made as the patents were about to expire, and all did expire before the case reached judgment in the trial court. All but one were held invalid, but one of the Alta Vista patents was the only patent relied on by petitioners which was held valid by the lower courts. The defensive purpose of this acquisition was plain, as the trial court found.[36]

After execution of the two contracts of April, 1934, the Gage pump was eliminated as a competitive product, the Kobe pump was "fenced" by the Gage and other patents against intrusion of a different and successful design, and all known potential competitors, except Rodless, had disappeared from the scene. But Rodless still retained an option to enter competition by claiming a license from Roko, and the elimination of this option was the next step in the Kobe career.

Second Rodless-Kobe Agreement.

On November 9, 1934, an amendment to the Rodless-Kobe agreement of 1933 was executed.[37] The material effect of this supplemental contract was that Rodless agreed that its right to be licensed under the Roko pool should be suspended so long as Kobe should continue to manufacture

35. R. 965-966.

36. Finding 38, R. 145.

37. R. 943-947.

and market hydraulic pumping equipment, in consideration of an adjustment of financial obligations to and by Roko, and a covenant by Kobe to pay 5% of its profits direct to Rodless until a stated sum was received. The price fixing provision of the original agreement was suspended so long as Kobe was sole licensee. Thus Rodless was eliminated as a possible future competitor, though it retained its stock in Roko and was entitled to share in the profits of the Kobe enterprise through the royalty provisions of the Kobe license which required division of profits in the whole hydraulic field. The Rodless interest in Roko and in the profits of the enterprise was itself eliminated in 1945, as later will appear.

Further Patent Acquisitions.

At the end of 1934 Roko held most significant current patents in the field, and all of the active potential producers of pumps had been swept into the pool. Kobe, as the sole licensee of Roko, immediately and vigorously began to exploit the commercial market for its product, offering to the trade only the Coberly design of pump. From early small beginnings Kobe's traffic in hydraulic pumping equipment increased rapidly to impressive totals, amounting to more than $4,000,000.00 in 1948,[38] the year in which this action was commenced.

But in the interim, Roko pursued its declared policy of expanding and consolidating its presumed "patent monopoly." Patent counsel for Kobe and Roko were directed to monitor patents issuing from the patent office and to report inventions which were related to the hydraulic pumping field.[39] From time to time, through counsel or directly,

38. R. 897.

39. R. 240, 241.

Roko sought out and procured exclusive rights in new inventions which were pertinent to the enterprise. In the period preceding 1945, various relevant patents were acquired from inventors named Tucker, Palm, Loewenthal, Worthington, Wray, Graffenstat, and others,[40] until Roko held a total of more than seventy patents relating to hydraulic pumps.

But Kobe's patent claims were even greater than its actual patent coverage. Its pump was widely advertised as manufactured under and protected by a total of ninety-one patents.[41] These claims were untrue, for they included many expired patents, many patents which did not even approach coverage of the Coberly pump, and others which did not cover pumps at all. These claims doubtless had their expected deterrent effect upon competition which might have arisen in a free market.

Abuses in Repair and Servicing.

Kobe was not content with its exclusive possession of the market for hydraulic pumps. It extended its exclusive control to the allied field of repair and servicing of pumping installations in the hands of purchasers, which of course was beyond the limits of any patent grant. In its early transactions, customers were required by annual contract to utilize Kobe facilities for repair and servicing of their purchases.[42] Subsequently this contracting practice was abandoned, but control of the function was still effectually reserved. Kobe refused to sell parts for its products except in connection with its own employment to effect re-

40. R. 223-226.

41. These claims were set forth in Plaintiffs' Exs. 2 and 3 which are not included in the printed record but which were before the Court of Appeals in original form.

42. R. 561.

pair.[43] Special tools were required to break down and reassemble the Kobe pump, and these Kobe refused to sell at all, but permitted their use only in Kobe shops.[43] The commerce pre-empted by these practices was not trifling, and is shown to have amounted to about a half million dollars per year in 1943 and 1944,[44] and was shown to have continued to and through the commencement of this action.

The Kobe-Dresser Merger.

Late in 1944, Dresser Industries, Inc., became interested in the Kobe enterprise. Dresser Industries is one of the great holding companies in which numerous lines of heavy oil field equipment have became concentrated. Dresser desired to integrate the Kobe enterprise in its program, and successfully proposed a plan for merger of Kobe into Dresser.[45] The plan provided for transfer of all assets of Kobe to Dresser, assumption by Dresser of all Kobe liabilities, and issuance of Dresser stock to Kobe, Inc., for distribution to its shareholders in exchange for surrender of its own stock, following which Kobe, Inc., was to dissolve. The plan was executed.

As an incident of the merger of Kobe into Dresser, the latter had acquired one-half the stock of Roko Corporation. Dresser then moved to acquire the remaining stock of Roko from Rodless, and did so pursuant to a written contract,[46] by which Rodless agreed to transfer the whole of its Roko stock to Dresser in exchange for shares of

43. R. 563, 564.

44. These figures are shown in Deft. Ex. 34 which is not included in the printed record but was before the Court of Appeals in a supplement to the printed record.

45. This contract of merger and related statements was Defendants' Ex. 34 which is not included in the printed record, see note 44.

46. R. 1223-1230.

Dresser stock. Thus Roko became the wholly owned subsidiary of Dresser, and Rodless was finally eliminated from any expectancy of participation in the future profits arising to the patent pool, except as its shareholders retained Dresser stock.

Dresser then caused the incorporation of a new corporate subsidiary which was given the name of Kobe, Inc., and into which was transferred all of the property and contracts which it had received from the former Kobe, Inc., together with all of the patents in the pool, which were assigned directly from Roko. Thus finally, all rights and benefits of the plans, contracts and rights of the hydraulic pump enterprise emerged in the petitioner Kobe, Inc. It retained and continued its exclusive possession of the market.

The consolidation into the petitioner Kobe, Inc., though recited above in separate steps, was coincident in point of time, and there was no interruption of the enterprise.[47] Coberly continued as president and directing head of the emerging corporation, the same manufacturing plants, resources, personnel, and products were continued in the new corporation, and the business enterprise continued without interruption under the same name and with the only change in the underlying ownership. Counsel for petitioners very properly admitted the single and continuous identity of the Kobe enterprise in his opening statement at the trial,[48] and the trial court found that the succession between the two Kobe corporations did not work an interruption or other change in the enterprise which was in effect a single continuous commercial project.[47].

47. Finding 34, R. 143; R. 167, 169.

48. R. 167.

The Intrusion of Respondents.

Kobe was in the full career of thirteen years of successful exclusive exploitation of the subject commercial field when the respondents, Dempsey Pump Company and Specialty Sales and Service, Inc., intruded upon the market in 1948. Dempsey was the manufacturer and Specialty was the sales agency of the venture. The Dempsey pump was an invention of Oscar E. Dempsey, and differed radically from the Kobe commercial product. It was introduced at the International Petroleum Exposition in Tulsa in May of 1948 and attracted immediate and wide interest among users of such equipment. Prior to its announcement to the trade, experimental installation of the Dempsey pump had been under close surveillance by Kobe's agents in the field, whose reports reflected increasing alarm at the evident success of the equipment.[49] Efforts were made by Kobe's agents to procure engineering details of the Dempsey pump, but were unsuccessful. When the new pump was exhibited at Tulsa, Coberly approached Dempsey and demanded, upon behalf of Kobe, that Dempsey withdraw from the market because his product infringed patents of the Kobe group. Dempsey replied that a patent search had been made and no infringement had been disclosed thereby. Coberly then declared to Dempsey that no one could make a satisfactory hydraulic pump without infringing one or another of the patents held in the Kobe pool.[50]

The new Dempsey enterprise was enthusiastically received by the trade, and great interest was shown by purchasers. Test installations by major operators were accepted in rapidly increasing numbers in the summer of 1948.

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49. Deft. Exhibit 26, R. 1187-1213; exhibit offered at R. 601, 602.

50. Dempsey, R. 595; Coberly, R. 232.

But Kobe was quick to take measures to discourage purchase of the Dempsey product. Its salesmen informed purchasing agencies of the major companies that Dempsey was an infringer and that his product doubtless would be "tested in court."[51] These representations were widespread and their effect was quickly felt by respondents' salesmen to whom they were reported. Within four months of announcement of the Dempsey product, Kobe filed an infringement suit at Tulsa wherein Dempsey was charged to infringe claims of five patents selected from the Kobe pool. Immediately following filing of the action Kobe published a letter addressed to some forty major operators in the area of Dempsey's operations advising them that the Dempsey pump was charged to infringe Kobe's patents and that suit had been brought against Dempsey.[52] These letters were addressed in nearly every instance to the purchasing agent of the company concerned, and the trial court found they were intended to forestall and prevent sales of the Dempsey product,[53] although no injunction for the purpose was obtainable upon the unused and unadjudicated patents involved. The letters and the oral disparagement of the Kobe salesmen had their intended effect, for the door of the market was literally slammed in the face of Dempsey and Specialty before they could even be heard upon the infringement charge. The salesmen of Specialty were confronted in every sales call with statements by purchasers that they could not negotiate further pending disposition of the infringement claim.[54] Companies which already had made installations of the Dempsey pump demanded and received

51. Finding 47, R. 148.

52. Finding 47, R. 148; R. 980-983.

53. Finding 47, R. 148, and Finding 54, R. 150.

54. R. 726-731, 769-770.

indemnity.[55] Other purchasers refused to pay for Dempsey pumps already installed until conclusion of the litigation.[56] The institution of the action, aided and furthered by the oral campaign of disparagement by Kobe salesmen and the written notice to the purchasing agents of large buyers, effectually and immediately shut down the Dempsey enterprise and kept it closed while the lawsuit pursued its weary and deliberate course. Great losses were sustained by Dempsey and Specialty in consequence of these acts, as both lower courts found.[57] They also found that the boycott by purchasers of the Dempsey product was the intended object of the letter and oral disparagements by Kobe.[58]

Not satisfied with its complaint of infringement, Kobe added a count for unfair competition[59] to its action against respondents in which it charged them with intentionally pirating Kobe personnel and Kobe's business secrets. This charge was wholly without probable cause, and failed utterly of proof at the trial, but it added substantially to the burden of the attack upon the respondents. It was rejected out of hand by the trial court.[60]

The lower courts had before them the detailed correspondence between Kobe employees respecting the intrusion of the Dempsey product and plans for its elimination. We shall not detail this evidence here but reference to its location in the record is found in the footnotes.[61] It was sufficient to persuade both lower courts that the concurrence of the infringement and unfair competition actions and the

55. R. 731, 1269.

56. R. 732.

57. Findings 48, 56, and 78; R. 148, 151, 157.

58. Finding 54, R. 150.

59. R. 28-31.

60. Finding 5, R. 134; Conclusion 8, R. 160.

61. Deft. Ex. 26, R. 1187-1213; offered, R. 604.

disparagements, both written and oral, which induced the customer boycott of the Dempsey product were pursuant to a deliberate plan to drive respondents from the competitive field, and to preserve the total monopoly of commerce which Kobe had maintained for fifteen years. The plan very nearly succeeded.

In the final event of the lawsuit, all but one of the Kobe patents were held to be invalid at law, and the one held valid and infringed expired before the case reached judgment in the trial court. Relief for the brief period of infringement of the valid patent was denied for abuse in violation of the antitrust laws, and petitioners were enjoined from further assertion of patents held in their pool. Damages were awarded to respondents upon a counterclaim for their losses sustained from the Kobe attack, which were principally commercial losses occasioned by the customer boycott, and the award was trebled under Section 4 of the Clayton Act.

The trial court entered 54 specific findings of fact on the monopoly issues of the case. By these findings petitioners were held to have plotted their ultimate complete monopoly from beginnings in 1933, and to have fashioned each step in their business career to its establishment, maintenance and perpetuation. They were held to have acquired and marshaled many patents with intent to use the same to prevent entry of competition to their product. Actual and potential competitors were absorbed or eliminated in the execution of their plan. The full force of their patent accumulations were focused upon respondents to drive them from the competitive field. Not content with expected judicial elimination of respondents, petitioners were found to have fomented and induced a customer boycott of respond-

ents' product which very nearly destroyed them, and which gave rise to the judgment in damages. The Court of Appeals affirmed the findings without exception.

The foregoing statement of the case is admittedly argumentative, and issue was drawn against many of the conclusions stated in the evidence at trial. But our statement is the aspect of the evidence which induced the findings, and is the condition of fact upon which the case was decided below. Unless this Court intends to try the facts again, it is apparent that the questions posed by the petition do not arise upon the record. We respectfully presume to restate them as they must be considered if the findings made and affirmed below are to be given effect.

Petitioners' Questions Restated.

Petitioners' first question, in view of the record, should be restated as follows:

1. Does the acquisition, pursuant to plan to monopolize an industry, of important patents in a field of commerce, including competitive and potentially competitive inventions, aided by restrictive contracts, and by envelopment of actual and potential competitors, coupled with the bringing of an infringement suit against the first intruding competitor, supplemented by the inducement of a customer boycott of the intruder's product, accompanied by misuse of the patents to control related commerce in unpatented goods and services, all resulting in the intended complete engrossment of a field of commerce, amount to a violation of Section 2 of the Sherman Act?

Petitioners' second question, again in view of the record, should be restated as follows:

2. When a monopolist, acting to protect further and maintain his monopoly, presses upon a competitor a legal action charging infringement of patents accumulated to

establish and further the monopoly, accompanied by inducement of a customer boycott of the competitor's product, and intends by such suit and boycott to drive the competitor from the competitive field, does the privilege of the policy of "free access" to the courts which protects maintenance of good faith litigation absolve the monopolist from consequences in damages under the Clayton Act for injuries inflicted by the concurring effect of the action and attendant boycott?

The questions really answer themselves in statement, and they are the questions which were decided adversely to petitioners by the two lower courts. If review is granted, they are the questions which will be presented for decision here.

Reasons for Refusing Review.

A comparison of the case as stated by petitioners with our statement of the issues, and with the statement contained in the opinion of the Court of Appeals, will indicate readily that the case turns chiefly upon issues of fact. We assume from *United States* v. *Oregon State Medical Society*, 343 U. S. 326, that the court does not desire to retry factual issues in connection with a petition for review. If this be the case, petitioners must bring the facts as they were found and affirmed below, and the questions presented upon the record are properly restated in terms of the considerations which induced the judgment attacked.

The best reason for refusal of review is that the judgment of the two lower courts correctly applies the law to the determined facts. A corollary consideration is that the existing law of the proper issues be plainly declared by paramount authority and be not generally misunderstood. Neither of these considerations implies necessity to review this case.

Patent Justification for Monopoly.

Petitioners' first "question" is a renewed effort to avoid the many rulings of this Court that the patent privilege may not be employed to subvert or avoid the penalties of the antitrust laws. We do not think that the law of this question is in anywise obscure.

The insufficiency of "mere accumulation" has been pointed out in *Automatic Radio Co.* v. *Hazeltine,* 339 U. S. 827, as petitioners observe. However, this Court has carefully warned from very early date, that the patent privilege confers no immunity from the penalties of the Sherman and Clayton Acts where patents are utilized in furtherance of the activities or results condemned by these laws. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, sounded the first warning in this respect. *Standard Oil Co.* v. *United States,* 283 U. S. 163, followed with a plain declaration that the limited monopolies granted to patent owners carried no exemption from the antitrust laws. Among many later applications of the rule, perhaps *Hartford Empire Co.* v. *United States,* 323 U. S. 386, best exemplifies its application to a factual situation wherein patents were employed to regiment, dominate and monopolize an industry. *Transparent-Wrap Machine Corp.* v. *Stokes and Smith Co.,* 329 U. S. 637, together with a number of similar decisions noted specific misuses of patents which violated the antitrust laws, including their employment to capture commerce in related unpatented goods. The evil of patent pooling in connection with a plan to restrain commerce, and the insufficiency of the patent privilege to justify the violation was noted and reiterated as recently as *United States* v. *New Wrinkle, Inc.,* (1952) 342 U. S. 371.

The Court of Appeals thought the question controlled

by *Hartford Empire Co.* v. *United States,* 323 U. S. 386, and by *United States* v. *Line Material Co.,* 333 U. S. 287 (R. 1327), and so do we.

In view of the findings of fact made in the case, we do not believe the opinion of this Court upon the issues is required to make clear the application of its many precedents. We think the judgments below have done so, and that further delineation of the authorities which bear upon offenses like to those of petitioners is unnecessary to the law.

The "Free Access" Question.

Petitioners' second contention is simply that because they employed the arm of the court, through an infringement action and an action for unfair competition, as a part of their attack upon respondents they are immune from damages by reason of the rule of public policy which extends privilege to good faith litigation of honestly disputed legal issues. Again the question urged does not fit the facts, for the legal action was but a part of a larger and overriding plan and operation to eliminate and destroy respondents before their entry into competition could become effective. While the trial court found that petitioners believed they would prevail upon their counts of infringement, the court also found that the action was maintained for the overriding purpose of preserving and insuring petitioners' solitary engrossment of the commerce involved. The action for unfair competition was wholly without probable cause, and cannot by any standard be judged to have been brought in good faith. Remember also that petitioners were not content to await judicial determination of their right or want of right in the premises. The customer boycott which was induced by the acts of Kobe was coincident with the action, and was calculated to achieve a destructive end before

judgment could be reached in the legal action. These were not isolated acts, but were a concert of action which was found to be the culmination of a long standing plan to forestall entry of competition in the pre-empted field.

In view of the facts, the legal question is not difficult, nor was the Court of Appeals without controlling precedent. Both lower courts thought the question was controlled by *Aikens* v. *Wisconsin,* 195 U. S. 194; *Swift & Co.* v. *United States,* 196 U. S. 375, and *American Tobacco Co.* v. *United States,* 328 U. S. 781, (R. 1331) wherein it is held that innocent and otherwise protected constituent acts when employed as the means to accomplish or further a prohibited end obtain the malevolent character of the prohibited whole, and are actionable notwithstanding privilege which might otherwise exist.

At page 1331 of the printed record, the Court of Appeals acknowledges petitioners' premise here. It is stated that if there were nothing more than the bringing of the infringement action to cause respondents' injuries, damages could not be recovered, but pointed out that this was not the case. At page 1332 of the printed record the court notes that to hold there was no liability for damages in this case would be to hold that a monopolist could smother every potential competitor with litigation and leave the competitor without his remedy. Obviously the arm of the courts of the United States may not be bent to the frustration of its own law, and certainly the mere inclusion of a legal action in concert with other non-privileged acts cannot imply immunity to their joint consequence.

Petitioners make much of the opinion of the Second Circuit Court of Appeals in *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791. Decided in 1924 by a divided court, it appears that review of this opinion by this Court was not

sought. It is suggested that the opinion of the Court of Appeals in this case renders circuits in conflict upon the damage question. We doubt that this results, or that the *Straus* case is any longer regarded as authoritative. The effect of the decision was to deny, in a similar case, recovery of attorneys' fees expended in the defense of the wrongful infringement action by a monopolist, but the commercial damages sustained as a result of a boycott similarly induced were sustained. A vigorous dissent in the case will appeal to the Court as resting upon the proper ground. We have been unable to find an instance in which the authority has been followed by another court upon the point raised here, and we do not believe that it is the source of substantial confusion in view of the plain pronouncements of this Court cited above and accepted as controlling by the Court of Appeals.

Conclusion.

We respectfully submit that review of the judgment in this case will result only in reiteration by this Court of the opinion of the Court of Appeals and that no consideration of general public concern or policy demands the review prayed for. We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 270.

KOBE, INC.,
a corporation,
and
ALTA VISTA HYDRAULIC COMPANY,
a corporation,
Petitioners,

vs.

DEMPSEY PUMP COMPANY,
a corporation,
OSCAR E. DEMPSEY,
SPECIALTY SALES & SERVICE, INC.,
a corporation,
and
M. L. WALRAVEN, JR.,
Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Our purpose in filing this reply brief is to make it clear that, regardless of anything said in respondents' brief, the questions stated on page 2 of our petition are squarely presented by this case.

A. The Issue of Monopolization.

This question was stated as follows in our petition:

"Does the mere acquisition, by a single owner, of most of the important patents in a field of commerce,

with the intent to use these patents to prevent infringement, coupled with the bringing of an infringement suit against an actual infringer of some of the patents, but without any refusal to grant licenses on reasonable terms, or other patent misuse, amount to a monopolization in violation of Section 2 of the Sherman Act?

After reading the suggested rephrasing of the above question on page 25 of respondents' brief, the Court may well wonder how two sets of counsel can differ so radically as to what question the case really presents. The answer is that respondents arrive at their version by treating as done by petitioner Kobe, Inc. acts which were admittedly done, and were found by the lower courts to have been done, by the prior corporation from which Dresser, petitioner's parent corporation, purchased the hydraulic pump business. Respondents' approach is typified by the statement on page 24 of their brief that petitioner Kobe, Inc. had "plotted monopoly" since 1933—this in spite of the fact that petitioner was not organized until 1945 and Dresser, its parent corporation, had no connection with the hydraulic pump business until that year.

Both the District Court in its Findings (Finding 28, R. 140) and the Court of Appeals in its opinion (R. 1323) conceded that the hydraulic pump business was acquired by Dresser from Old Kobe in an arms-length transaction in 1945, and that petitioner Kobe, Inc. was thereupon organized by Dresser to receive the assets, including the patents, which Dresser had acquired, and to take over and continue the operation of the business. While the lower courts found that Dresser and petitioner Kobe, Inc. intended to "maintain, preserve and exercise" the monopoly that the previous owner had allegedly had (Finding 44, R. 147), *there is nothing in the Findings below, and nothing*

in the record, to indicate that Dresser or petitioner Kobe, Inc. intended to attain these objectives by any other means than preventing infringement of their patents, or that they in fact did anything except to file an ordinary infringement suit and to give notices legitimately incident thereto.

Efforts of respondents to create the impression that petitioner Kobe, Inc. committed other acts of alleged patent abuse are without substance. Any attempt to fix prices, or enforce restrictive policies in servicing and repairing pumps, occurred early in the history of the previous owner of the business, and was discontinued by such previous owner long before 1945, and no finding was, or could have been, made by the courts below that petitioner Kobe, Inc. had engaged in these practices. While respondents refer repeatedly to petitioner's "disparagement" and "inducement of customer boycott" of respondents' product, the sum total of the showing of the record as to what petitioner did with regard to respondents is, as stated with record references on pages 14 and 15 of our petition, as follows:

(a) On September 14, 1948 petitioner filed the present suit.

(b) On various occasions shortly before suit was filed, when customers asked salesmen of Kobe, Inc. whether it intended to sue Dempsey for infringement, the salesmen replied that plaintiff Kobe, Inc. believed that the Dempsey pump might infringe its patents, and that, as soon as it learned definitely that a sale had been made, it would probably test the question of infringement in court.

(c) After filing the suit, and after receiving many inquiries about the suit from customers, petitioner Kobe, Inc., on September 27, 1948, sent out to purchasing agents or other executives of certain of its customers a letter advising them in factual and restrained terms that suit had been filed.

Like the filing of the suit itself, the notices referred to in (b) and (c) above were bound to have some effect in discouraging sales of respondents' infringing pumps. This being so, the lower courts had adequate basis for finding that, like the suit itself, the notices were intended to effect these results. However, as shown by the cases cited on page 15 of our petition, factual notices of this type have universally been held to be legitimate incidents of a suit for patent infringement.

While respondents, on page 22 of their brief, set forth a highly colored version of these matters, a careful reading of those portions thereof which are supported by record references will show that they do not contradict in substance the statements made by us above.

It is therefore clear that all the petitioner Kobe, Inc. did in the instant case was, first, to acquire important patents in a field of commerce, with the intent of using these patents to prevent infringement, and, second, to bring an infringement suit against the actual infringer of some of the patents, and to give factual notices legitimately incident to the suit. As stated in our petition, it was specifically found by the District Court that neither respondents nor anyone else ever asked petitioner Kobe, Inc. for a license under any of its patents, and that petitioner never refused to grant anyone such a license (Finding 43, R. 146).

If these acts alone amount to the offense of monopolization in violation of Section 2 of the Sherman Act,* petitioner was guilty thereof. We submit, however, that the question is one which has never been decided by this Court, and which is of such importance in the field of conjoint

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* While respondents seek to create the impression that petitioner was also found guilty of a violation of Section 1, this is entirely untrue and the only finding below was that petitioner was guilty of "monopolization" in violation of Section 2. See Conclusions of Law (R. 160).

application of the patent laws and the antitrust laws that this Court should take jurisdiction and decide it in this case.

B. The Issue of Liability for Damages.

This question was stated as follows on page 2 of our petition:

> "When a patentee files an infringement suit against an actual infringer of his patents in the belief that he is entitled to the relief prayed for, does the fact that the court in such suit holds that he is guilty of monopolization, and that the suit is a step in effectuating the same, convert the suit *ab initio* into a wrong against the infringer, so as to render the patentee liable to the infringer, under Section 4 of the Clayton Act, for treble the damages sustained by the infringer as a result of the suit?"

That this second question is squarely presented by the instant case appears clearly from the following facts:

1. As shown above, the only action of petitioners which affected respondents in any way was the filing of the infringement suit and the giving of the incidental factual notices thereof.*

2. While the District Court held that the suit was filed, and the notices given, in furtherance of petitioner's alleged purpose to exclude competitors, it specifically found (Finding 55, R. 151):

> "Plaintiff Kobe, Inc. did not prosecute its infringement action in bad faith, but pressed the same be-

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* While, as pointed out by respondents, the complaint herein was amended on February 4, 1949, to include allegations of unfair competition by respondents—for which allegations we believe there was probable cause—there is no finding and no indication in the record, that this amendment caused any damage to respondents or affected them in any way.

lieving that it would recover the judgments prayed for therein, and believing that it was legally entitled to the relief prayed for. It also believed it had a legal right to circularize its letter of September 27, 1948 as an accompaniment of the infringement action."

It is established law that even an actual infringer of patents has a complete defense if he can establish that the patentee has used his patents in violation of the antitrust law. However, no court before the lower courts in this case ever held that proof of this defense converts the suit, even though filed by the patentee in the belief that he was entitled to the relief prayed for, into an "injury" within the meaning of Section 4 of the Clayton Act, so as to allow the infringer to recover from the patentee treble damages for the adverse effects flowing from the filing.

As shown on pages 17 to 21 of our petition, the holding of the lower courts herein is in square and admitted conflict with the decision of the Second Circuit Court of Appeals in *Straus v. Victor*,* and is a serious impairment of the doctrine of free access to the courts.

We submit that our petition should be granted.

Respectfully submitted,

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Counsel for Petitioners.

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* While respondents state that the court in *Straus v. Victor* sustained an award of "commercial damages," a glance at the opinion of the court, or at the discussion in our petition, will show that such award was made on an entirely separate issue.